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FILED
MAR 1 1974
MICHAEL RODAK, JR., CLERK

No. 73-1151

In the
Supreme Court of the United States
OCTOBER TERM, 1973

JOSEPH A. ROSIN, et al.,
Petitioners,
vs.
THE NEW YORK STOCK EXCHANGE, INC., et al.,
Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF TO THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JURISDICTION

This supplemental brief is filed pursuant to Rule 24(5) of the Revised Rules of the Supreme Court of the United States. The petition for certiorari is pending.

ADDITIONAL REASON FOR GRANTING THE WRIT

V.

THE DECISION OF THE LOWER COURT IS IN CONFLICT WITH THIS COURT'S RECENT DECISION IN Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, (No. 72-312, Decided December 4, 1973), 94 S.Ct. 383.

In the *Ware* case, *supra*, this Court affirmed the analytical framework of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 in testing whether a stock exchange rule pre-empted a conflicting California statute. That test involved considerations of congressional aims and purposes of the Securities Exchange Act as circumscribing stock exchange rule-making powers. The Court specifically noted that, "• • • any rule or practice not germane to fair dealing or investor protection would not appear to fall under the shadow of the federal umbrella; • • •." *Ware, supra*, 94 S.Ct. at 391.

> "As seen by our discussion above, §§6(d) and 19(b) of the Act, 15 U.S.C. §§78f(d) and 78s(b), establish the measure of congressionally delegated authority for self-regulation in the national interest." *Ware, supra*, 94 S.Ct. at 393.

The court below upheld respondents' rules retaxing investors with respondents' Section 31 privilege tax without finding that the stock exchanges had authority under §19(b) to adopt such rule or that such rule met the standards imposed by §6(d), *i.e.*, that such rule be "just and adequate to insure fair dealing and to protect investors." Nor did the court below identify any policy objective in the Exchange Act that is served by rules requiring investors to pay respondents' franchise tax, in addition to brokerage commissions paid to member-brokers.

Absent such analysis and findings now mandated by *Ware, supra,* and absent any finding that Congress intended investors to pay respondents' §31 privilege tax, the decision of the court below rests upon extraneous matters which are irreconcilable to the principles applicable to judging the legality of stock exchange rules amplified in the *Ware* case.

That it is convenient for respondent stock exchanges to charge and overcharge their §31 privilege tax from members' customers, instead of charging themselves the tax from their ample internal housekeeping revenue, achieves no national policy objectives reflected in the Exchange Act. *Cf. Ware, supra,* 94 S.Ct. at 394. On the contrary, the practice is inconsistent with national policy underlying §31 of the Exchange Act, and that inconsistency is a limitation upon respondents' rule-making autonomy, §6(c), 15 U.S.C. §78f(c). *Cf. Ware, supra,* 94 S.Ct. at 391.

CONCLUSION

For the foregoing additional reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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